SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 484.

THE DISTRICT OF COLUMBIA

vs.

ELIAS E. BARNES.

Reply Brief.

There is much in the brief of the appellant to which I can take no other exception than to say it appears to me utterly foreign to the questions at issue.

The recital of the act of 1871 and the decisions of this court referred to are relied on by me in my original brief, but the language on page 4, "If a suit, &c., had been brought in one of ITS COURTS;" and further down, "The suit is not brought under the statutes CREATING the MUNICIPALITY," I do not exactly comprehend. It is the first time I have ever heard, and I have been a member of its bar for over thirty-five years, that the supreme court of the District of Columbia was other than a United States court, or that it was the creature of that municipal corporation designated the District of Columbia, which did not exist for at least

eight or nine years after the establishment of the court. I was not, nor am I yet, aware that that municipality *had* courts of its own. I have always thought and still think that the District of Columbia is amenable to the supreme court of the District by virtue of its habitat within the territorial jurisdiction of the court, and the words District of Columbia, as applied to the court, was a mere convenient mode to define its territorial jurisdiction, not to make it a municipal court; and such is undoubtedly the law. The other phrase seems to indicate that a municipal corporation can be amenable only to such courts as existed at the date of its charter, and that no subsequently established court can have its jurisdiction so enlarged as to embrace it. That doctrine is equally untenable. Congress has power to create new courts or increase the jurisdiction of existing ones, as it did by the act of June 16, 1880, so as to make the District amenable to their process, and the municipal corporation, as the creature of Congress, has no rights whatthat the Congress is legally bound to respect. Its power over it is supreme and limitless. The appellant devotes part of his brief apparently to an effort to induce the court to believe that it erred in dismissing the former appeal, but his argument now is even weaker than his former brief, and I may well let that question, which is in no way involved here, rest where this court left it.

While the brief fairly concedes the general rule of law with respect to the invasion by Congress of the judicial power, it has undoubtedly happened, as stated by the Chief Justice in *Stevens vs. Cherokee Nation*, 174 U. S., 478—

"That the grant of a new remedy by way of review has often been sustained UNDER PARTICULAR CIRCUMSTANCES."

There is nothing in this case which would authorize Congress to take it out of the general rule.

Every opportunity has been offered and taken advantage of by the *special assistant attorneys* representing the Dis-

trict. Patient trials and retrials have been had. The District has not only had *its day* in court, but it has had ever since August 4, 1880, the date of filing the petition (Rec., p. 1), more than *twenty-three years*, in lieu of a day, and it still seeks to protract this litigation with formal and non-meritorious appeals until it shall at least round out a full *quarter of a century*. The District has had *three* patient, protracted, and painstaking trials in the Court of Claims, one appeal to this court, and two appeals to the lobby, where that iniquitous legislation known as "riders" to appropriation bills has been resorted to to overturn orderly, judicial procedure and protract the official longevity of special assistant attorneys, and as a result of this unwise, ill-considered, and vicious legislation the appellant is now here seeking a second appeal to this court, and that, too, in a case where, as the findings of fact clearly show (Rec., pp. 4–20), the appellee has been awarded only the *exact price* that both parties to the contract, at the time fully understood and agreed, was to be his compensation and the *exact quantity of work* performed by the appellee, "which work was accepted by the Commissioners and the District received the benefit of" (Rec., Findings IX (10), XIII, (20).

This case furnishes an object-lesson that more than vindicates the views of Mr. Justice Brewer on the subject of the abuse of appeals, as expressed in the *Independent* of October 29, 1903. The action of the appellant is such an abuse, and it is confidently submitted that it should find no sanction in this court.

The cases cited by the able special assistant attorney to warrant the maintenance of this appeal all were "sustained under particular circumstances;" they differed from this case in that they had *merit*, of which this is utterly devoid; and while in the administration of justice it is permissible, and even possibly wise, to do a "little wrong" to accomplish a great good, the converse of the proposition, that "a great wrong" may be done to accomplish "no good whatever," is not at

all sustainable. Permit me to review the cases cited on page 15 of his brief and point out the inapplicability or peculiar circumstances that justified their exemption from the general and otherwise universal rule.

Calder *vs.* Buel, 3 Dall., 386:

> That case has no application; it was a construction of the colonial charter of Connecticut, under which, by royal charter, the legislature was empowered to grant new trials, and notwithstanding it was obnoxious to the principles that our Revolutionary forefathers fought for and won, still that principle, the independence of the judiciary, was not given a *retrospective* effect. It is, instead of aiding my adversary, a strong authority against giving a retrospective effect to the legislation herein complained against. See remarks of Chief Justice Mellin in Lewis *vs.* Webb, reviewing this case and refusing to follow it for the reasons above given (3 Maine, 326).

Sampeyreac *vs.* U. S., 7 Peters, 222:

> In this case the original decree, which was the subject of a bill of review, *was a mere nullity* and the act in that case was limited to such cases in which the original decree was founded upon forgery and fraud; and the further reason that the original proceedings were against the *sovereign*, whose power to make or increase conditions is conceded in all proceedings against itself.

Freeborn *vs.* Smith, 2 Wall., 160:

> This case simply permitted a *casus omissus* to be remedied by making provision as to what became of the cases pending in the territorial courts of Nevada, no mention being made in the act admitting it as a

State. It does not at all touch the doctrine contended for by appellee.

Garrison *vs.* New York, 21 Wall., 196:

This case simply holds that the sovereign State of New York in taking property for public use, under the law of eminent domain, may vacate any inquest taken by her direction and order a new one when the first proceeding has been fraudulently or irregularly conducted; that no vested rights accrue till the property is actually taken.

Freeland *vs.* Williams, 131 U. S., 405:

Holds simply that that provision in the constitution of the State of West Virginia prohibiting seizure of goods in payment of judgments rendered on account of acts done according to the rules of civilized warfare during the civil war was not obnoxious to the clause in the Constitution forbidding the impairment of the obligation of contracts by the several States.

Essex Public Road Board *vs.* Skenkle, 140 U. S., 334:

This case turned upon the power of the legislature over its municipal corporations, or quasi corporations, created for public purposes. They are merely governmental agencies, exist wholly for public purposes, and the power of the legislature over them is *plenary*. It has often been held that they may be compelled to pay claims to which they have valid legal defenses, and it is no doubt true that this present legislation is good as against the District of Columbia, and an appeal by Barnes would lie. The act of June 16, 1880, would be *unconstitutional* if the Congress had not this plenary power over the District, for that *act* would de-

Dist. Cola. vs. Johnson, 165 U.S. 330-338

> prive the municipal corporation of its constitutional right of the trial by jury, if it had any such right. But the act is not within the power of Congress as against the citizen. This question is fully discussed in Judge Dillon's excellent work on Municipal Corporations.

Stevens *vs.* Cherokee Nation, 174U. S., 445:

> The status of Indian tribes is akin to that of municipal corporations with respect to the power of Congress over them. They have been designated by this court "as wards of the nation." Congress is their guardian; it legislates in a quasi-paternal way over them; they are not citizens, but a "dependent nation," and as in this case great public scandal and fraud had followed immature and hasty legislation, those "*particular circumstances*" were present that in the interest of public justice warranted the examination of the *political* question of tribal citizenship by this court.

The appellee confidently rests his contention upon the cases cited in his original brief and respectfully insists that the act of March 3, 1903, confers no jurisdiction on this court to entertain this second appeal.

II.

But if the appellee is in error as to his right to have this cause dismissed for want of jurisdiction, this motion may, he submits, under the terms of paragraph 5 of rule 6, be taken and treated as a motion to affirm, there being clearly no appealable question presented in the record, the appeal being for *delay merely*. This record affords clear evidence thereof, for while this retrospective act was passed March 3,

1903, and applicable only to this case (R., p. 25), it was not until May 11, 1903, that even an application for appeal was filed, and that was permitted to rest till *October 26, 1903*, five months after its filing, and one motion day after another was allowed to pass without calling it up; and in not filing the transcript in this court until November 21, 1903, the appellant gained *nine months'* delay and prevented the appellee from raising this question at the *last* term of this court. A reasonably prompt exercise of the appellant's claimed rights would have secured to appellee an early hearing. The appellee further suggests that the language of the act provides that the "appeal shall be *allowed*" within *ninety days*, and although rule 3 does suspend the limitation of time from running pending the application for an appeal, under the general law, it is still debatable whether this *rule* can or ought to have any application to this *special* appeal. It is submitted that it does not apply, and that under the circumstances the appellant ought not to profit by his *laches*. If the whole course of legal procedure is to be waived retrospectively for his benefit, he ought to at least to be diligent in availing himself of it, especially where the appellant is represented by not only the Assistant Attorney General, but by a *special assistant attorney*. For this reason alone the appeal should be dismissed.

Motion to Affirm.

There is no question of law raised by this record. Any one that has progressed only so far in the study of the law as to have reached even a casual reading of the Eighth Commandment, would not have the slightest trouble in comprehending and mastering every question that can possibly arise; and if the case ever proceeds further in this court, it will overtax the almost limitless and inexhaustible ingenuity of the learned and erudite special assistant attorney to get up

even a *pro forma* assignment of errors. There are absolutely none presented in the findings. The whole record prescribed under rule 1 of this court is printed; no part of the record prescribed by this court is omitted. This is practically admitted by the appellant, for in his brief, on page 7, while truly saying that a judgment in favor of the District was once rendered and a new trial was granted (but omitting to mention that on that new trial a judgment for a very large amount was rendered in favor of appellee, and subsequently the District was granted a new trial, and on the *third* trial a still larger sum was found in favor of the appellee; which *third* judgment is the one now appealed from) concludes with the remarkable statement that the questions he proposes this court shall review are questions relating to matters of practice in the Court of Claims, or questions addressed to the discretion of that court in the granting or refusing new trials; for he says:

"A new trial (the first one) was granted, and after proceedings, MANY OF WHICH WERE MADE THE SUBJECT OF EXCEPTIONS, which will appear upon the trial of the merits, a judgment was entered in favor of claimant."

A fair, frank, and full concession that the questions he seeks to have reviewed are questions of practice or questions raised by bills of exception, which do not and cannot exist, in an appeal from the Court of Claims; and the right to review questions of that character is, apparently, seriously contended for in the very teeth of the law quoted by him on page 6 of his brief, that this very right of appeal is granted *only* subject to such rules and regulations as this court shall prescribe (Sec. 2, act June 16, 1880, Supp. R. S., vol. 1, p. 563), and that rule 2 of this court prescribing the rules and regulations for appeals in District of Columbia cases carefully omits from the record on appeal *every such question;* and the still further fact that this court has held again and again that the Court of Claims was bound by no strict rules

of pleading or practice (U. S. *vs.* Behan, 110 U. S., 338; Clark *vs.* U. S., 95 U. S., 539; U. S. *vs.* Burns, 12 Wall., 246).

And the Court of Claims itself has frequently so announced.

Nothing is left but *questions of fact*, which are conclusively settled by the findings of fact (R. R. Co. *vs.* U. S., 116 U. S., 154, and 117 U. S., 355; Mahan *vs.* U. S., 14 Wall., 109).

I therefore most respectfully but most urgently insist that, even though this harsh and cruel statute must stand, this court shall exercise the power it has so often decided it possesses (see U. S. *vs.* Grant, 110 U. S.) and consider this motion as well a motion to affirm, and in the interest of justice not permit this litigation to be uselessly and needlessly further protracted—*cui bono*—nor allow this aged man to go down to his grave in penury and want, while the appellant still enjoys the benefit of his labor and capital.

Respectfully submitted.

JOHN C. FAY,
Attorney for Appellee.

APPENDIX.

LEGISLATIVE HISTORY OF THE PASSAGE OF THE AMENDMENT TO THE GENERAL DEFICIENCY BILL, APPROVED MARCH 3, 1903, AUTHORIZING APPEALS IN DISTRICT OF COLUMBIA CASES FROM THE COURT OF CLAIMS TO THE SUPREME COURT OF THE UNITED STATES.

The general deficiency bill, as reported by the House Committee on Appropriations, carried an appropriation to pay the judgment in favor of Barnes. The amendment was never considered by any committee of the House, but was offered as an amendment on the floor of the House on February 23, 1903, by Mr. Barney, of Wisconsin, a few minutes before the passage of the bill (Cong. Record, 57th Congress, 2d session, p. 2537), as follows:

Mr. BARNEY: I offer the amendment which I send to the desk.

The clerk read as follows:

"Insert in line 9, p. 83, after the word 'judgment,' the following: 'except the judgment in favor of Elias E. Barnes;' and in lines 11 and 12 strike out $45,964.06 and insert $22,269.59."

The amendment was agreed to.

Mr. BARNEY: I offer a further amendment, which I send to the desk.

The clerk read as follows:

Insert in page 83, after line 14, as follows: "And provided further, That no judgment heretofore or hereafter rendered under the act of June 16, 1880, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by, Congress, be, and the same is hereby repealed; and from all final judgments or decrees

heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury."

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Page 2537: Mr. BARNEY: * * * We were told by the attorneys that this was the only case that it will affect; that all others have been settled by the payment of the final judgment or in some other way.

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Page 2538: Mr. BARNEY: This amendment was drawn by the attorney for the District of Columbia, and is in the exact language which was submitted by him, and he informed us that it applied only to the cases arising under the act of 1880.

Mr. COWHERD: I do not want to reserve the point of order if it does not affect those cases arising under the act of 1895.

The CHAIRMAN: The Chair understands the gentleman from Missouri withdraws the point of order.

Mr. COWHERD: Yes.

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The question was taken and the amendment was agreed to.

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The bill was then passed.

PROCEEDINGS IN THE SENATE.

Page 2544: House bill referred to Committee on Appropriations.

Page 2777: February 23, 1903, reported back with amendments.

Page 2880: March 2, 1903, passed the Senate with amendments.

Page 2943: March 2, 1903, House disagrees to Senate amendments *en bloc*, and asks for conference.

Page 3007: Conference report agreed to.

Page 3008: Bill passed March 3, 1903.

So, without any consideration, without Barnes ever having an opportunity to be heard, and after the Committee on Appropriations had unanimously reported an appropriation paying the judgment, on the say-so of the attorney for the District, Mr. Barnes' property was thus unceremoniously swept away from him, if this statute is to have a retrospective effect.